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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JACK MCCORMICK, Plaintiff and Appellant, v. SAN PEDRO BAIT COMPANY, INC., Defendant and Respondent.	B215111 (Los Angeles County Super. Ct. No. NC042366)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roy L. Paul, Judge. Affirmed.

Preston Easley for Plaintiff and Appellant.

Law Offices of Virgil L. Roth, Virgil L. Roth, Anthony A. Dimonte and Charles D. Ferrari for Defendant and Respondent.

Plaintiff and appellant Jack McCormick filed a complaint for damages against defendant and respondent San Pedro Bait Company (San Pedro) alleging negligence. According to the complaint, San Pedro was the owner, operator, supervisor, controller, and manager of a newly constructed bait barge that was being placed in the water by Bob Hill Hydraulic Crane Rentals, LLC (Hill). Hill employed McCormick as an extra driver assigned to a 300-ton crane.

While putting San Pedro's bait barge into the water, McCormick suffered severe and debilitating injuries when he fell into an unguarded opening in the deck of the barge. The accident was caused by San Pedro's negligent failure to cover or barricade the deck opening.

The trial court entered an order sustaining evidentiary objections and granting summary judgment in favor of San Pedro. McCormick appeals from this order, as well as the subsequently entered judgment.

McCormick contends on appeal as follows: (1) San Pedro supplied Hill with defective equipment and supervised the launch of the barge, bringing the case within the exception in *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (*Hooker*) to the doctrine of *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*); (2) under *Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137 (*Evard*), San Pedro's violation of Cal-OSHA regulations regarding covering deck openings affirmatively contributed to McCormick's injury and justified denial of summary judgment; (3) San Pedro's failure to guard the inspection hatch openings defies all notion of vessel safety; (4) cases rejecting or distinguishing *Evard* are incorrectly decided; (5) there is no defense in California or under federal maritime law for "open and obvious" dangers; and (6) the trial court erroneously sustained evidentiary objections to declarations by McCormick and Mitchell Stoller, a maritime safety expert.

We hold summary judgment was properly granted under the *Privette* doctrine and need not address the evidentiary issues as inclusion of the stricken evidence would not alter our conclusion that San Pedro had no duty to McCormick under the facts presented.

San Pedro's Motion for Summary Judgment

San Pedro moved for summary judgment on the basis that it owed no duty to McCormick, whose exclusive remedy was under the workers' compensation law under *Privette, supra,* 5 Cal.4th 689. The separate statement of undisputed facts sets forth the following.

San Pedro built the bait barge, which had hatches for inspection of leaks. The first attempt to place the barge in the water, using a crane company other than Hill, was unsuccessful.

McCormick was a crane operator, working as "third man out" on the day of the accident, hauling counterweight for the 300-ton crane belonging to Hill. Four Hill employees, including McCormick, were fastening rigging around the barge. Persons associated with San Pedro said they did not know how to fasten the rigging and asked the Hill employees to perform that task. Johnny Elms, the crane operator for Hill that day, agreed Hill would take care of the rigging.

McCormick was holding the rigging, making sure the shackles did not spin, when he stepped back and fell into a hole in the deck. The hole was approximately two feet wide and three feet deep. He suffered injuries to his leg, neck, back, shoulder, and elbow.

There were openings in the deck of the barge, which McCormick could see without difficulty when setting up the rigging. He was aware of the openings at the time he fell into the hole. He knew the openings were there when he was tightening the rigging.

McCormick did not recall having any conversations with anyone from San Pedro. He never requested anyone from San Pedro to provide him with directions or orders. He did not ask anyone from San Pedro to provide him with tools, equipment, or gear, and San Pedro did not do so. Safety issues were discussed with Hill employees.

McCormick brought a workers' compensation claim, and he has been receiving benefits.

McCormick's Opposition to Summary Judgment

McCormick argued in his opposition that the case was not controlled by the *Privette* doctrine, but instead fell within the reasoning of *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219 (*McKown*).

McCormick disputed that control of the bait barge was surrendered to Hill, but agreed that Elms was in charge of crane operations. He disputed that he testified the inspection openings were left uncovered to allow for immediate checking of the barge for leaks or other potential problems, arguing it was counsel for San Pedro who said the holes were obvious, while in fact the holes were unguarded and unmarked.

McCormick asserted that San Pedro's negligent failure to cover or barricade deck openings affirmatively contributed to his accident and that San Pedro supplied McCormick with an unsafe and defective bait barge. Neither McCormick nor Hill had authority to cover or barricade openings in the deck, they had no equipment to install covers or barricades, and McCormick was never asked or instructed to do so. Hill controlled only the lift of the barge, and control of the barge was never surrendered to McCormick or his employer. The deck openings could have been barricaded or guarded with secure covers. The barge was designed, built, and supplied by San Pedro.

McCormick's opposition was supported by the declaration of Stoller, a vessel safety expert. Stoller declared McCormick was injured when he fell into an opening measuring approximately 22 by 18 inches and 3 feet deep. San Pedro should have covered the openings or barricaded them with railings, which could have been removed to allow for inspection of leaks. This unsafe condition led to and caused McCormick's accident. A Cal-OSHA regulation, section 8374, title 8, article 6, requires small hatch openings and deck openings less than 18 square feet to be guarded by a guardrail. San Pedro violated this safety regulation. Federal OSHA regulations require that small deck openings shall be suitably covered or guarded to a height of not less than 30 inches, except where impracticable. Private entities dealing with deck safety also require coverings or guardrails.

San Pedro's Reply and Objections to Evidence

San Pedro filed a reply, taking issue with McCormick's legal analysis. In addition, San Pedro filed multiple evidentiary objections to statements contained in the declarations of McCormick and Stoller.

The Trial Court's Ruling

The trial court sustained an evidentiary objection to that part of McCormick's declaration identifying photographs of the barge, on the basis of lack of foundation and improper authentication. An objection was sustained to McCormick's statement that Hill controlled only the lifting of the barge, but control of the barge was not surrendered to Hill.

The trial court also sustained evidentiary objections to portions of the declaration filed by Stoller as an expert. The court sustained objections to Stoller's statements that he had reviewed relevant safety standards, San Pedro rendered the barge unsafe for McCormick, the unsafe conditions caused the accident, and San Pedro violated safety regulations. The court also sustained objections to references to safety requirements of private entities.

The trial court granted the motion for summary judgment. The court ruled that under the *Privette* doctrine, San Pedro had no duty to Hill's employees to prevent or correct unsafe conditions, procedures, or practices that San Pedro did not affirmatively cause or contribute to. Under *Toland v. Sunland Housing Group* (1998) 18 Cal.4th 253 (*Toland*), a party hiring a contractor need not take special precautions to protect the contractor's employees. Under *Hooker*, *supra*, 27 Cal.4th 198, a landowner is liable to an independent contractor's employee only if the landowner retained control over the contractor's work and contributed to the injuries. Here, San Pedro did not retain or exert control over the operation and performance of Hill, and no conduct affirmatively contributed to McCormick's injuries.

Reliance on *McKown, supra*, 27 Cal.4th 219, was misplaced because in *McKown* the hirer provided unsafe equipment to the contractor whose employee was injured, affirmatively contributing to the injury. No unsafe equipment was provided by San Pedro for the crane operation. To the extent the uncovered openings constituted a dangerous condition, they were open and obvious to McCormick, according to his deposition testimony, precluding liability under *Kinsman v. Unocal* (2005) 37 Cal.4th 659 (*Kinsman*).

Turning to the various regulations of Cal-OSHA and OSHA, the trial court ruled that safety regulations are relevant but only where the hirer affirmatively contributes to the plaintiff's injuries under *Millard v. Biosciences* (2007) 156 Cal.App.4th 1338 (*Millard*). Because San Pedro did not affirmatively contribute to McCormick's injuries, the safety regulations do not expand San Pedro's duty to McCormick. Finally, it was impractical to cover the holes that were to remain open for inspection, as this was not a barge in normal operation.

DISCUSSION

McCormick argues San Pedro supplied defective equipment—in this case the barge and barge deck—and supervised the launch of the barge and made the decision to leave the hatch openings uncovered so that the *McKown* and *Hooker* exceptions applied to the *Privette* doctrine. We disagree that San Pedro had a duty to McCormick under the facts presented at the summary judgment motion.

Standard of Review

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except

that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' [Citations.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

A. The *Privette* Doctrine

Privette, *supra*, 5 Cal.4th 689 involved a complaint alleging that Privette hired a roofing company, which employed the plaintiff, who was injured while transporting hot tar. The plaintiff, who was covered under the Workers' Compensation Act, filed a tort action against Privette alleging liability under the doctrine of peculiar risk because of the inherent danger of working with hot tar. (*Id.* at p. 692.)

Rejecting liability, our supreme court held as follows: "When an employee of the independent contractor hired to do dangerous work suffers a work-related injury, the employee is entitled to recovery under the state's workers' compensation system. That statutory scheme, which affords compensation regardless of fault, advances the same policies that underlie the doctrine of peculiar risk. Thus, when the contractor's failure to provide safe working conditions results in injury to the contractor's employee, additional recovery from the person who hired the contractor—a nonnegligent party—advances no societal interest that is not already served by the workers' compensation system. Accordingly, we join the majority of jurisdictions in precluding such recovery under the doctrine of peculiar risk." (*Privette*, *supra*, 5 Cal.4th at p. 692.)

Subsequent cases have refined the *Privette* doctrine. *McKown, supra,* 27 Cal.4th 219 involved an action by an employee of an independent contractor hired by Wal-Mart to install sound systems in its stores. Wal-Mart requested that the work be done by the

contractor with Wal-Mart's forklifts. The plaintiff was injured while working on a Wal-Mart forklift, which was not properly equipped with safety chains, and a jury found Wal-Mart negligent in providing unsafe equipment. The question presented on appeal was whether *Privette* shielded Wal-Mart from liability. *McKown* held that *Privette* did not preclude liability.

"[W]hen a hirer of an independent contractor, by negligently furnishing unsafe equipment to the contractor, affirmatively contributes to the injury of an employee of the contractor, the hirer should be liable to the employee for the consequences of the hirer's own negligence. 'The general supervisory right to control the work so as to insure its satisfactory completion in accordance with the terms of the contract does not make the hirer of the independent contractor liable for the latter's negligent acts in performing the details of the work. [Citation.] An owner is not liable for injuries resulting from defective appliances *unless he has supplied them* or has the privilege of selecting them or the materials out of which they are made [citation] or unless he exercises active control over the men employed or the operations of the equipment used by the independent contractor. [Citation.]' (*McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 788-789, italics added.) *McDonald* predates *Privette*, but as the Court of Appeal here observed, it serves to underline the fact that, 'where the hiring party actively contributes to the injury by supplying defective equipment, it is the hiring party's own negligence that renders it liable, not that of the contractor.'" (*McKown, supra,* 27 Cal.4th at p. 219.)

In *Hooker, supra*, 27 Cal.4th 198, the California Department of Transportation (CALTRANS) hired a contractor to construct an overpass. The contractor's employee was killed while operating a crane. It was alleged CALTRANS was liable for the death of the crane operator because it allowed traffic to use the overpass during construction, which lead to the crane operator's death. The question presented was whether an employee of a contractor may sue the hirer of a contractor for the tort of negligent exercise of retained control. (*Id.* at p. 201.)

"We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety

conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries. In this case, although plaintiff raised triable issues of material fact as to whether defendant retained control over safety conditions at the worksite, plaintiff failed to raise triable issues of material fact as to whether defendant actually exercised the retained control so as to affirmatively contribute to the death of plaintiff's husband. Therefore, the trial court properly granted summary judgment in favor of defendant, and the Court of Appeal erred in reversing that judgment." (*Hooker*, *supra*, 27 Cal.4th at p. 202.)

B. Analysis under *Privette* and its Progeny

We hold that the undisputed facts demonstrate that this case falls within the rule set forth in the *Privette*—that generally an independent contractor's employee who is injured on the job is only entitled to recover under the workers' compensation law. Here, McCormick was an employee of Hill, an independent contractor of San Pedro. San Pedro is not liable for McCormick's injury.

McCormick's attempt to bring this action within the holding in *McKown* fails. *McKown* involved defective equipment provided to a contractor, which resulted in injury to an employee of the contractor. We agree with the trial court that San Pedro did not provide defective equipment to Hill. All of the crane operation was performed using Hill's equipment. It is undisputed that San Pedro did not supply equipment to assist Hill in moving the barge from dry land into the water.

McCormick's attempt to analogize the open inspection hatches on the barge to the defective forklift in *McKown* is without merit. The forklift in *McKown*, supplied by Wal-Mart, was equipment used to perform the contractor's work. The barge in this case was not used to perform the job of lifting the barge into the water, and in no sense is San Pedro's conduct analogous to Wal-Mart's act of supplying a defective forklift in *McKown*. Moreover, the evidence is undisputed that San Pedro did not maintain or

exercise any control over Hill's crane operation, further precluding liability under *Hooker*.

The principles expressed in *Toland, supra,* 18 Cal.4th 253, demonstrate that *McKown* has no application in this case. In *Toland,* an employee of a framing contractor was injured when a wall fell on him. He brought suit against the project's owner and general partner. The court held there was no liability to the owner and general partner under *Privette*, because a person hiring an independent contractor "has *no* obligation to specify the precautions an independent hired contractor should take for the safety of the *contractor's employees*" and "[a]bsent an obligation, there can be no liability in tort." (*Toland, supra,* at p. 267.) Applying *Toland* to the instant case, San Pedro had no obligation to dictate what steps Hill should take to protect McCormick during the operation to lift the barge into the water.

McCormick's reliance on *Elsner v. Uveges* (2004) 34 Cal.4th 915 (*Elsner*) fairs no better. *Elsner* held that Labor Code section 6304.5, as amended in 1999, repealed a ban on admission of Cal-OSHA provisions in third party negligence cases to establish a standard or duty of care.

As latter cases have recognized, *Elsner* did not overrule the *Privette* doctrine. "Thus, as the court in *Elsner* emphasized, amended [Labor Code] section 6304.5 was not intended to expand a general contractor's duty of care to an injured employee of a subcontractor. This includes the limitations on such a duty imposed by *Privette* and its progeny. Under amended [Labor Code] section 6304.5, safety regulations may be admissible in actions by employees of subcontractors brought against general contractors that retain control of safety conditions, but only where the general contractor affirmatively contributed to the employee's injuries." (*Millard, supra,* 156 Cal.App.4th at p. 1352; *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 673, fn. 14 (*Padilla*) [admission of Cal-OSHA regulations under *Elsner* "does nothing to expand the general common law duty of care"]; *Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1279-1280 (*Madden*) [*Elsner* did not abrogate *Privette* or *Toland* "nor expand a general contractor's duty of care to an injured employee of a subcontractor"].) Because San

Pedro did not retain control of safety conditions as the barge was lifted into the water and did not affirmatively contribute to McCormick's injury, the existence of Cal-OSHA and OSHA regulations regarding deck openings does not create a basis for liability.

Equally unavailing is McCormick's reliance on *Evard, supra,* 153 Cal.App.4th 137, in support of the argument that the violation of Cal-OSHA[1] and OSHA regulations on covering or protecting deck openings gave rise to liability on the basis of negligence per se. *Evard* held that safety regulations created nondelegable duties on the part of a party hiring a contractor whose employee was injured. The analysis of *Evard* has received a hostile reception, and we join other courts in declining to follow it. (See *Padilla*, *supra*, 166 Cal.App.4th at p. 672-673 [notwithstanding *Evard*, not every regulation creates a nondelegable duty, and if a duty exists, it remains subject to *Hooker's* requirement of affirmative contribution to the accident by the defendant]; *Madden*, *supra*, 165 Cal.App.4th at pp. 1280-1281 [*Evard* overlooked *Hooker's* requirement that the owner's omission affirmatively contributed to the plaintiff's injury].)

Assuming San Pedro had a nondelegable duty to cover the inspection hatches before barge construction was complete, McCormick was required to demonstrate that San Pedro's conduct affirmatively contributed to his injury. (*Padilla*, *supra*, 166 Cal.App.4th at pp. 672-674; *Millard*, *supra*, 156 Cal.App.4th at p. 1353.) As discussed earlier, McCormick has not presented evidence that San Pedro affirmatively contributed to his injuries. To the contrary, all the crane activity related to moving the barge into the water was performed by Hill employees using Hill's equipment. San Pedro employees specifically asked Hill to do all the rigging, as they had no knowledge of how to perform

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1 California Code of Regulations, title 8, section 8374, article 6, provides in part as follows: "(b) Every . . . small hatch opening, deck opening, or companionway opening through which access must be had, and whose open area is less than 18 square feet, shall be guarded by a guardrail which will not have to be removed to give access to or through the opening. Where such railings are located on tank tops or inner bottoms, they shall not be less than 30 inches height, shall completely encircle the opening, and shall consist of a single rail. Rail and uprights shall be of iron or steel. In locations other than tank tops or inner bottoms, similar guards shall be used, but with the addition of 4-inch toeboards where necessary."

the task. McCormick testified he did not speak to any San Pedro employee, did not receive equipment or tools from them, and safety was discussed by Hill employees. Notwithstanding *Evard*, McCormick has not demonstrated the existence of a material disputed fact that San Pedro affirmatively contributed to his injuries.

There is an additional basis for denial of liability because, as recognized by the trial court, McCormick was fully aware of the uncovered openings. McCormick testified at his deposition that he was aware of the openings, which were not difficult to see. He knew the openings were present when he was affixing the rigging. McCormick was aware of the openings at the time the rigging was being tightened.

McCormick incorrectly argues there is no defense against a claim of injury due to unsafe conditions for open and obvious defects. The correct rule of law is that there is no obligation to protect an invitee upon land against known or apparent dangers which an invitee may reasonably be expected to discover and avoid. (*Lucas v. George T. R. Murai Farms, Inc.* (1993) 15 Cal.App.4th 1578, 1590.)

This rule is demonstrated in *Kinsman*, *supra*, 37 Cal.4th at pages 673-674, in which our Supreme Court addressed the liability of a hirer to an employee for dangerous conditions on the work premises. "Thus, when there is a known safety hazard on a hirer's premises that can be addressed through reasonable safety precautions on the part of the independent contractor, a corollary of *Privette* and its progeny is that the hirer generally delegates the responsibility to take such precautions to the contractor, and is not liable to the contractor's employee if the contractor fails to do so. We see no persuasive reason why this principle should not apply when the safety hazard is caused by a preexisting condition on the property, rather than by the method by which the work is conducted." (*Ibid.*) "Rather, consistent with the above discussion, the hirer as landowner may be independently liable to the contractor's employee, even if it does not retain control over the work, if (1) it knows or reasonably should know of a concealed, preexisting hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." (*Id.* at p. 675.)

Here, the uncovered openings were apparent to McCormick and his employer. Nothing was concealed regarding the condition of the barge and the deck openings. Hill, as contractor, could have easily taken steps to avoid the danger, but did not do so. San Pedro is not responsible for McCormick's injuries from such an obvious condition.

Propriety of Evidentiary Rulings

We have determined that summary judgment was properly granted, as San Pedro had no duty to McCormick, and none of the exceptions to the *Privette* doctrine apply. Nothing in the stricken portions of McCormick's and Stoller's declarations would alter our legal determination that summary judgment was properly granted. We therefore do not discuss, or express any opinion on, the merits of the evidentiary rulings.

DISPOSITION

The judgment is affirmed. San Pedro Bait Company, Inc. is awarded costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.